

No. 19,644

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

*See also  
Vol. 3330*

SEABOARD SURETY Co., a corporate entity, etc., *et al.*,  
*Appellants,*

*vs.*

UNITED STATES OF AMERICA for the Use and Benefit  
of C. D. G., Inc., a corporate entity,  
*Appellee.*

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## PETITION FOR REHEARING.

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SEABOARD SURETY Co., a corporate entity, etc., *et al.*,  
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*Appellee.*

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## PETITION FOR REHEARING.

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*To the Honorable Oliver D. Hamley, Circuit Judge,  
Gilbert Jertberg, Circuit Judge, and William Jame-  
son, District Judge:*

Appellants hereby petition for a rehearing to reconsider the judgment entered in this action on January 17, 1966, on the following ground:

*The method used by the trial court and approved by this court to compute the amount of the judgment does not conform to the standard of recovery set forth in the rule of law adopted by the Court.*

In its decision this Court makes a distinction between two different measures of recovery depending upon whether or not the subcontractor has competed performance. Citing *B. C. Richter Contracting Co. v. Continental Casualty Co.*, 1964, 230 A.C.A. 540, 41 Cal. Rptr. 98, the Court stated that when confronted by a breach by the prime contractor, the subcontractor elects

to complete performance, the measure of recovery is "*the unpaid balance of the contract price plus extra costs caused by hindrances and delays.*" (p. 6). The Court further held that where, as was found in this case, the subcontractor is prevented from completing performance by a wrongful termination he has the option to forego a suit for damages on the contract and may claim "*the reasonable value of his performance.*" (p. 7). The Court later cited portions of the District Court's memorandum opinion, which would indicate that the District Court adopted and applied the latter measure of recovery (p. 10). The Court also incorporated the District Court's computation of the amount of recovery (p. 4). (See attached Exhibit A).

It is respectfully submitted that the basic error in this case is that there is no evidence to support the computation and furthermore the computation does not support recovery under either of the foregoing theories.

Assuming that the finding as to the total amount spent by plaintiff on the project (\$187,223.19) is correct, there remain two essential elements of the computation which lack supporting evidence. First there is the item designated "Cost of Work Performed under the Contract," \$97,000.00. There was no evidence whatever of the cost of the work performed under the contract as distinguished from total cost. The figure of \$97,000.00 is the *contract price* for the completed work. Secondly, the item designated "Cost of the Excessive Work" at \$67,667.39 is unsupported by any evidence. An analysis of the derivation of this figure shows that the Court started with the total cost of \$187,223.19 and first subtracted the "Cost of Work Performed Under the Contract" (\$97,000.00) which as stated above was simply not proved. The remainder (\$90,223.19) is designated "excessive cost." There is no evidence in the record of the actual cost of extra work, nor evidence of



its quantity or quality. The 75%/25% allocation of fault does not correct the error because the Court applied these percentages to a figure which was never proved: *i.e.*, the artificially determined “excessive cost” figure.

Appellants do not contend that it would be improper for a Court to take the available evidence and by logic and arithmetic arrive at a figure which fairly represents *reasonable value*. Appellants do contend, however, that the computation here is illogical because of the confusion of the concepts of *cost* and *price* and further that there was no evidence regarding the allocation of actual costs as between work under the contract and extra work. Seemingly the only function of the deduction of the contract price from the cost was to reduce the figure to which plaintiff’s 25% inefficiency was to be applied, and there was certainly no evidence that plaintiff was inefficient only as to the work outside the contract.

Although the decision purports to be based upon *reasonable value* the computation was made in terms of *unpaid balance of contract price plus extra costs caused by hindrance and delay*. The computation does not support recovery under the latter theory either, however, because of the aforementioned lack of proof of the allocation of costs. This lack of evidence should be viewed in the context of a decision where the amount awarded for extra work (\$67,667.39) is approximately 38% of the total amount found to have been due appellee (\$178,167.39) and approximately 60% of the amount of the judgment (\$112,338.39). The judgment is more than three times the amount the Court found due as the balance of the Contract.

The confusion as to which theory of recovery was actually applied here is illustrated by this Court’s discussion of pre-judgment interest. The court states that

the \$97,000.00 representing cost of work performed under the contract was ascertainable by calculation whereas the \$65,667.39 due for extra work was not (p. 11). If this is in fact a pure reasonable value case then it would seem that the \$97,000.00 can be at most evidence of the reasonable value of work under the contract and the entire judgment was ascertainable only by judicial determination and there should be no prejudgment interest awarded.

Appellants urge that the evidentiary problem in this case involves a basic question of law which has important and far-reaching policy implications.

That basic question of law is:

In a claim by a subcontractor under a Miller Act or Capehart Act bond, what is the standard for proving the reasonable value of the work performed?

Appellants have been unable to locate any case which adequately answers this question and it is felt that this case presents the question in its purest form.

Prime contractors, subcontractors and sureties all need an answer to the question posed herein. If it is the law that a subcontractor need merely prove the actual costs incurred without isolating costs under the contract and costs for extra work, then the law should be so stated in order that the parties, particularly sureties, may adjust their business dealings accordingly.

WILLIAM E. FITZPATRICK and  
PETER A. LEWIS,

By WILLIAM E. FITZPATRICK,  
*Attorneys for Appellants.*

**Certificate.**

Undersigned counsel certifies that this petition is not interposed for delay and that in his judgment it is well founded.

Dated: February 15, 1966.

WILLIAM E. FITZPATRICK



## EXHIBIT "A".

### "COST OF COMPLETED UNITS

at contract price:

|                   |              |
|-------------------|--------------|
| 98 units at \$875 | \$ 85,750.00 |
|-------------------|--------------|

### COST OF UNCOMPLETED UNITS:

|                                     |                       |
|-------------------------------------|-----------------------|
| 22 units at contract price of \$875 | \$ 19,250.00          |
| Less cost of completion             | 8,000.00 <sup>6</sup> |
|                                     | 11,250.00             |

### COST OF WORK PERFORMED UNDER THE CONTRACT

\$ 97,000.00

### COST OF THE EXCESSIVE WORK necessitated by the de- fendant Desert Builders' failure to supply materials when required

67,667.39

|                       |              |
|-----------------------|--------------|
| Total cost of project | \$187,223.19 |
|-----------------------|--------------|

|   |           |
|---|-----------|
| Cost of work performed under the contract | 97,000.00 |
|---|-----------|

|                |              |
|----------------|--------------|
| Excessive cost | \$ 90,223.19 |
|----------------|--------------|

|                                     |     |
|-------------------------------------|-----|
| Defendant's share of excessive cost | 75% |
|-------------------------------------|-----|

|  |              |
|--|--------------|
|  | \$ 67,667.39 |
|--|--------------|

|                            |           |
|----------------------------|-----------|
| Deposited in trust account | 15,000.00 |
|----------------------------|-----------|

|                    |           |
|--------------------|-----------|
| Less Trustee's fee | 1,500.00  |
|                    | 13,500.00 |

### TOTAL AMOUNT DUE PLAINTIFF

\$178,167.39

Received by plaintiff

65,829.00

### TOTAL AMOUNT NOW DUE PLAINTIFF

\$112,338.39

Plaintiff shall be entitled to recover interest thereon from July 24, 1961, and its costs."

